

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7316

Investigation into regulation of Voice over)
Internet Protocol ("VoIP") services)

Order entered: 2/2/2012

ORDER CLOSING DOCKET

I. INTRODUCTION

On November 16, 2011, the Vermont Department of Public Service (the "Department") filed a motion to close this Docket (the "DPS Motion"). In that motion, the Department requested that we close this investigation and declare the Order we issued on October 28, 2010 (the "Phase I Order"), to be the final order for Docket 7316. For the reasons discussed herein, we grant the DPS Motion.

II. BACKGROUND

This Docket was opened on May 16, 2007, in response to a petition from the Department asking the Vermont Public Service Board ("Board") to undertake a generic investigation into the nature and extent of Voice over Internet Protocol ("VoIP") services offered in Vermont and to clarify the regulatory status of VoIP service providers operating in this state.

At the suggestion of the Department, and with support from Comcast Phone of Vermont, LLC ("Comcast Phone" or the "Company") and the group of independent Vermont local exchange carriers (the "Independents"), this Docket originally was divided into three phases: Phase I (fact finding), followed by Phase II (jurisdictional determination) and Phase III (exercise of jurisdiction, if any).¹ At the conclusion of the technical hearings in November of 2008, the Department recommended — and the other parties agreed — that Phase I (fact finding) and

1. Docket 7316, Order of 3/7/08.

Phase II (jurisdictional determination) should be consolidated into a single Phase I for purposes of efficient post-hearing briefing.²

On October 28, 2010, we issued the Phase I Order, in which we determined that fixed VoIP services offered in Vermont fall within the statutory definition of a "telecommunications service" under Vermont law, and that the Board's authority to regulate fixed VoIP services is not preempted by federal law. We further directed the assigned Hearing Officer to conduct a second phase of investigation in this Docket for the purpose of examining "how the Board should exercise its regulatory jurisdiction over VoIP services, if at all."³

On November 12, 2010, Comcast Phone filed a motion seeking reconsideration of the Phase I Order. Upon the denial of that motion on February 11, 2011, Comcast Phone attempted to appeal the Phase I Order to the Vermont Supreme Court. On May 18, 2011, the Vermont Supreme Court dismissed Comcast Phone's appeal on the grounds that no final judgment had been rendered in Docket 7316 and no permission had been sought or received to file an interlocutory appeal.⁴

The next day, on May 19, 2011, the Hearing Officer convened a status conference for the purpose of defining the scope and setting a schedule for Phase II. At that conference, all parties — except the Independents — agreed that it would be desirable to initially defer litigation for a period of several months to allow the parties to pursue a regulatory settlement.⁵ While the Department and Comcast contemplated using this period to explore settlement with each other, the remaining parties expressed a strong interest in being included in those settlement discussions.⁶ As a result, at the end of the status conference, the parties were given 10 days to discuss among themselves whether there would be "a comprehensive group of negotiators or

2. Tr. 11/18/08 at 216-217 (Cotter).

3. Phase I Order at 34 and 43.

4. Vt. Sct. Docket No. 2011-130, Entry Order dated May 18, 2011.

5. Tr. 11/18/12 at 29-30.

6. Tr. 11/18/12 at 16 (Central Vermont Public Service Corporation); 19 (FairPoint); 22 (Burlington Electric Department); and 25 (Independents).

whether this is going to be a negotiation between the Department and Comcast."⁷ Thereafter, a procedural schedule would be issued once the parties had advised whether or not they would be able to work together during the negotiation period.

On May 31, 2011, Comcast Phone filed an assented-to scheduling proposal that provided for a one-month period in which any party could engage in "separate, confidential discussions" with the Department, followed by a two-month period in which the Department would "facilitate collective discussions involving all parties who choose to participate."⁸ Thereafter, on October 3, 2011, the Department was to file either a regulatory settlement or a proposed Phase II litigation schedule based on consultations with the parties.

On October 3, 2011, the Department filed neither the regulatory settlement nor the proposed litigation schedule contemplated under the Procedural Order. Instead, the Department filed a letter explaining that, after extended discussions, "both Comcast Phone and the Department had concluded that substantial time and resources should not be invested in developing a regulatory regime for Fixed VoIP services prior to a final resolution that Fixed VoIP services are subject to the Board's regulatory jurisdiction."⁹ The Department therefore recommended that the Board "suspend the deadline for filing a Phase II litigation schedule" in favor of providing Comcast Phone with an opportunity "to promptly file a motion with the Board seeking review of the Phase I Order by the Supreme Court"¹⁰

In the six weeks following the filing of the DPS Status Report, no party filed a response or otherwise commented on the Department's suspension recommendation, nor did Comcast Phone file a motion seeing leave to obtain a review of the Phase I Order from the Vermont Supreme Court.

On November 16, 2011, the Department filed the DPS Motion, explaining that since the filing of the DPS Status Report, "Comcast Phone has stated that it will not seek permission to file

7. Tr. 5/19/11 at 39 (Hearing Officer).

8. Docket 7316, Order of 7/13/11 (the "Procedural Order.")

9. DPS Motion at 4.

10. *Letter from Megan Ludwig, Esq., on behalf of the Department, to Susan Hudson*, dated October 3, 2011 (the "DPS Status Report").

an interlocutory appeal of the Phase I Order."¹¹ Citing the "interest of efficiency," the DPS Motion asked that the Board "issue a final Order in Docket 7316 Phase I, and close the Docket, so that the Phase I Order may instead be appealed to the Supreme Court as a final judgment."¹² The Department further requested that the Board (1) open a second docket in due course to take up the regulatory policy questions regarding Fixed VoIP that otherwise would have been examined in Phase II of Docket 7316; and (2) "make clear that the Phase I Order does not make Board Rules that govern 'telecommunications services' applicable to Fixed VoIP Services immediately" and that the applicability of such Board Rules will be determined in a later, separate Docket.¹³

On November 23, 2011, Comcast Phone filed a letter supporting the DPS Motion, and confirming that "it will not seek permission to file an interlocutory appeal" of the Phase I Order.¹⁴

On December 1, 2011, the Independents filed a response opposing the Department's request to finalize the Phase I Order and to close this Docket.¹⁵

On December 15, 2011, the Department filed a sur-reply to the Independents' Reply.¹⁶

On January 11, 2012, the Board heard oral argument on the DPS Motion.

11. DPS Motion at 4.

12. DPS Motion at 4-5.

13. Under the Department's proposal, the Board would defer opening this second Docket until after the final disposition of any appeal of the Phase I Order to the Vermont Supreme Court.

14. *Letter from Andrew Raubvogel, Esq., on behalf of Comcast Phone, to Susan M. Hudson*, dated November 22, 2011. During oral argument on the DPS Motion on January 11, 2012, counsel for Comcast Phone clarified that the Company had concluded that the time had expired for pursuing an interlocutory appeal. Tr. 1/11/12 at 21 (Raubvogel).

15. *Independents' Opposition to the Vermont Department of Public Service's Motion to Finalize Phase I of Docket 7316 and Close the Docket*, dated December 1, 2011 (the "Independents' Reply").

16. *Vermont Department of Public Service's Reply to the Independents' Opposition to the Department's Motion to Finalize Phase I of Docket 7316 and Close the Docket*, dated December 15, 2011 (the "DPS Reply").

III. DISCUSSION

Positions of the Parties

The Independents

The gist of the Independents' opposition to the DPS Motion is that the Department effectively is attempting "to obtain the relief of an interlocutory appeal and stay, without having to argue and prove the criteria required for each."¹⁷ Furthermore, noting that Comcast Phone presently enjoys the advantage of competing directly with the Independents without the restraint of regulation as a telecommunications service provider, the Independents assert that granting the DPS Motion "will result in a waste of judicial and the parties' resources, result in undue delay, prejudice to the other parties, violate prior agreements between the parties and abuse the administrative and judicial process."¹⁸ The Independents maintain that it would be more efficient to complete the Phase II policy investigation within Docket 7316 because it would ensure that only one, comprehensive appeal would be sought on all appealable issues at the end of Docket 7316, as opposed to creating the risk of two successive appeals by severing Phase II from Docket 7316 and opening a second, subsequent Docket to further examine regulatory issues concerning VoIP services in Vermont.¹⁹ Finally, the Independents contend that the Department's unilateral action in seeking such relief amounts to a violation of its obligation under the Procedural Order to "facilitate collective discussions involving all parties who choose to participate."²⁰

The Department

The Department contends that forging ahead with Phase II in the face of Comcast Phone's known opposition to the jurisdictional conclusions in the Phase I Order "would essentially result

17. Independents' Reply at 4.

18. Independents' Reply at 4-5.

19. Independents' Reply at 6.

20. Independents' Reply at 4 (*quoting* Procedural Order at 2).

in an unproductive stalemate due to the looming prospect of appeal and reversal of the Board's determination forming the basis of Phase II."²¹

The Department responds to the Independents' objections to the DPS Motion by pointing out that finalizing the Phase I Order and closing this Docket now would "avoid a substantial waste of time and resources that would otherwise occur if the Board were to proceed with Phase II without first obtaining finality on its Phase I determination that Fixed VoIP services are subject to regulation as telecommunications services" ²² According to the Department, the Independents' assertion that completing Phase II within Docket 7316 will waste less time "ignores the possibility that joint appeal of both Phase I and Phase II in Docket 7316 will only lead to re-litigation of Phase II, as well as the likelihood pursuing Phase II in Docket 7316 will be far more contentious and time-consuming, and far less cooperative and productive, than it could otherwise be in a new service policy docket after the issue of the Board's jurisdiction over Fixed VoIP services is settled."²³

Analysis

Much of the Independents' opposition to the DPS Motion appears to spring from a sense of not having received the benefit of the assented-to process in the Procedural Order. Based on the Procedural Order, the Independents had expected that the parties would negotiate a litigation schedule in the absence of a regulatory settlement. The Independents point out that they had wanted to "press forward with litigation" in the spring of 2011, but that instead, "against their better interest," they assented to the schedule set forth in the Procedural Order because they "understood there was going to be a collaborative process" and therefore they "agreed to forego an immediate litigation schedule."²⁴ But, according to the Independents, that collaborative process never took place. Instead, all they received was one day's notice on November 15, 2011,

21. DPS Reply at 3.

22. DPS Reply at 2.

23. DPS Reply at 3.

24. Tr. 1/11/12 at 15 (LaRae-Perez).

that the Department would file the DPS Motion asking to finalize the Phase I Order and to close this Docket.²⁵

In turn, the Department explains that, after the initial period for settlement discussions, it did not undertake to facilitate the collaborative discussions contemplated in the Procedural Order because it had become apparent during the initial settlement discussions that there was no regulatory settlement to be reached with Comcast, and that therefore "there was nothing that we could bring to other parties and have a larger discussion" ²⁶

The Independents have correctly pointed out that the Department failed to strictly abide by the terms of the Procedural Order when it failed to file either a regulatory settlement or to negotiate and propose a litigation schedule for Phase II on October 3, 2011.²⁷ That said, we are persuaded that there was good cause for the Department to depart from the requirements of the Procedural Order by instead recommending on October 3, 2011, that the Board suspend the deadline for filing a Phase II litigation schedule — the Department and Comcast had failed to make any progress toward reaching a regulatory settlement during their initial discussions, and both parties had concluded that further action in this Docket would be unproductive absent a final ruling on our regulatory jurisdiction.

While it might have been desirable for the Department to have consulted more with the Independents before making its suspension recommendation, there was nothing preventing the Independents or any other party from making a filing to oppose the Department's recommendation or to request relief from the Board.²⁸ The fact that no such request was made suggests that the Independents saw no need and were not prepared to insist upon strict

25. Tr. 1/11/12 at 15-16 and 18 (LaRae-Perez).

26. Tr. 1/11/12 at 18 (Ludwig).

27. We take this opportunity to remind all parties that scheduling orders are entered for the purpose of ensuring procedural clarity and predictability, and that all parties are entitled to rely upon the Board's procedural orders in managing the preparation and presentation of their respective cases. Absent good cause, all parties are expected to abide by the terms of these orders.

28. For instance, in the weeks after the deadline for filing either a regulatory settlement or a litigation schedule had passed on October 3, 2011, the Independents could have — but did not — file a request for a status conference or otherwise seek to enforce the Procedural Order.

compliance with the Procedural Schedule. In the end, though, whether or not a Phase II litigation schedule had been negotiated and filed as required under the Procedural Order, the Board likely would have faced the same question that has been posed by the DPS Motion, namely, whether it makes the most sense to close this Docket now or to proceed with Phase II as contemplated under the Procedural Order.

The Independents have argued at length that in filing the DPS Motion, the Department has attempted to secure the equivalent of a stay and leave to take an interlocutory appeal without making the requisite case that the standards for such relief have been met.²⁹ We find the Independents' argument to be misplaced. In the DPS Motion, the Department neither requests a stay of this Docket nor permission to file an interlocutory appeal. Rather, the Department has asked that the Board terminate this Docket at this time, and that the investigation of the regulatory status of VoIP services in Vermont be resumed at a later time, once the Board's jurisdiction to regulate these services under Vermont law has been conclusively established.

The fact that our decision to grant the DPS Motion may be similar in effect to issuing a stay and granting leave to file an interlocutory appeal would be an incidental impact of our decision, as opposed to a bar that forecloses us from granting the DPS Motion. Thus, the Independents' argument overlook the controlling consideration of whether we have the power to convert our Phase I Order into a final order and to close this Docket at this time. Significantly, the Independents have presented no authority or rationale demonstrating that we lack such discretion.³⁰

In requesting that we finalize the Phase I Order, the Department in substance has sought a revision of an interlocutory order so as to render it a final order. Such motions are "appropriate under the general power of revision contained in V.R.C.P. 54(b)."³¹ It is well established under

29. Independents' Reply at 4.

30. To the contrary, during oral argument regarding the DPS Motion on January 11, 2012, the Independents, the Department and Comcast Phone respectively acknowledged that the Board has the authority to alter the procedural structure of this Docket as warranted to ensure the efficiency of its proceedings. Tr. 1/11/12 at 9 (Larae-Perez), 11 (Ludwig) and 22 (Raubvogel).

31. *Dudley v. Snyder*, 140 Vt. 129, 131, 436 A.2d 763, 764(1981). The Vermont Rules of Civil Procedure apply to Board proceedings pursuant to Board Rule 2.105. In turn, V.R.C.P. 54(b) provides that an order that is not final

Vermont law that courts retain the power to revise their interlocutory orders before they have been entered as final orders.³² Moreover, it is equally well established that courts are vested with "inherent powers" to exercise the control necessary "to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."³³ In this case, in the interest of efficiency and judicial economy, we find it is appropriate to exercise our discretion to terminate at this time our investigation into the regulatory status of VoIP services under Vermont law, and to allow the process of appeal to go forward.

We recognize that, to date, the Independents and all other parties to this proceeding have made a substantial investment of time and resources in conducting discovery, presenting testimony and extensively briefing the legal issues. However, we find it significant that the Department — who is the public advocate and the original proponent of this investigation — has concluded that "it would be an inefficient use of Board resources and an unnecessary expense to the taxpayers of Vermont" if Phase II of this docket were to go forward without first "securing finality on the Phase I Order"³⁴ Thus, we are persuaded that finalizing our Phase I Order and closing this Docket to facilitate an appellate review of our jurisdictional conclusions represents the best chance for preserving the value of the collective investment that all parties have made to date in participating in this investigation. Therefore, we grant the DPS Motion.

In granting the DPS Motion, we emphasize that it is not our intent for the Phase I Order to be construed as subjecting VoIP services at this time to any general or specific Vermont state-law-based regulation.³⁵ Rather, we expressly reserve for determination in a future Docket the extent to which any Vermont state-law-based regulation should attach to VoIP services, to

"is subject to revision at any time before the entry of judgment"

32. *Brown v. Tatro*, 136 Vt. 409, 411, 392 A.2d 380, 382(1978)("Prior to becoming final as defined in V.R.C.P. 54(b), an interlocutory order or judgment is left within the plenary power of the court that rendered it to afford such relief as justice requires . . .").

33. *Link v. Wabash Railroad Co.*, 370 U.S. 626, 630-31 (1962)(citing cases).

34. DPS Reply at 6.

35. See Phase I Order at 42-43 ("[T]he second phase of this docket will consider the extent to which we should exercise our jurisdiction to regulate VoIP services as telecommunications services under Vermont law.")

include the applicability of Board Rules governing "telecommunications services" as defined under Vermont law. In addition, we remain open to other parties filing a petition to open such a subsequent docket once the appeal, if any, of the jurisdictional ruling in Our Phase I Order has been resolved.

IV. ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Public Service Board of Vermont that:

1. The Order issued in this proceeding on October 28, 2010, shall be deemed to be the Final Order in Docket 7316.
2. This Docket shall be closed.

Dated at Montpelier, Vermont, this 2nd day of February, 2012.

<u>s/ James Volz</u>)	
)	
)	PUBLIC SERVICE
)	
<u>s/ David C. Coen</u>)	BOARD
)	
)	OF VERMONT
<u>s/ John D. Burke</u>)	

OFFICE OF THE CLERK

FILED: February 2, 2012

ATTEST: s/ Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.